No. 08-4132
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MITCHELL ROSIN,	)	
	)	**Appeal for the United States District**
Plaintiff,	)	**Court Northern District of Illinois**
	)	
	)	
v.	)	
	)	
JOHATHAN E. MONKEN, Director,	)	
Office of Governmental Affairs	)	**No. 08 C 3541**
State Police, and	)	
TRACY NEWTON, Supervisor, Sex	)	**Honorable Judge Der-Yeghiayan**
Offender Registration, Illinois State	)	
Police,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY BRIEF

Thomas Peters
Kevin Peters
Attorneys for Plaintiff
407 S. Dearborn, Suite 1675
Chicago, Illinois, 60605
312-697-0022

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ARGUMENT

I.

THE FULL FAITH AND CREDIT CLAUSE REQUIRES ILLINOIS TO HONOR THE PLEA AGREEMENT ENTERED IN NEW YORK, AND THAT PLEA AGREEMENT PRECLUDES SEX OFFENDER REGISTRATION. THERE WOULD NOT BE A REGISTERABLE SEX OFFENSE IN ILLINOIS WITHOUT THE NEW YORK PLEA, AND ILLINOIS CANNOT USE THE NEW YORK PLEA TO ESTABLISH A REGISTERABLE SEX OFFENSE IN ILLINOIS.

On March 27, 2003, Plaintiff pled guilty to a misdemeanor sex offense in New York. (App., 12,13). When he entered the plea, Plaintiff was living in Illinois, and he had not lived in New York for approximately three years, starting shortly after the alleged offense. (Id.). He entered the plea for the express purpose of avoiding sex offender registration. (Id.). The misdemeanor offense to which he pled, unlike felony sex offenses in New York, did not require sex offender registration. Instead, registration was left to the discretion of the sentencing judge. Plaintiff therefore insisted on a waiver of registration in exchange for his plea. (Id.). The New York court agreed to that exchange, and the court exercised its discretion to waive registration, a point that is conclusively proved by the written plea agreement. (Reply Brf. App., at 1-15).

Nonetheless, Defendants maintain that Illinois can ignore the New York court's order and use that plea as the predicate offense for sex offender registration in Illinois, even though in New York Plaintiff is not required to register. According to Defendants, their "public policy" concerns trump New York's equally important policy concerns, as well as the Full Faith and Credit Clause of the national constitution. Because Illinois is constitutionally obligated to enforce the New York plea in the same manner the plea is

enforced in New York, Defendants' contentions must be rejected and the case remanded for a trial on the merits.

Defendants make three mistaken assertions in an attempt to avoid complying with Full Faith and Credit Clause. First, Defendants maintain that the New York court's order does not expressly preclude sex offender registration in other states, as if every state court order must specify that all other states are bound by it. (Def. Br., at 10-13). Second, they assert that this Court should evaluate the Federal Full Faith and Credit claim in accordance with New York's approach to such claims, thereby turning over to every state court the final say so on federal constitutional issues. But see U.S. Const. Art. VI, Section 2, *Marbury v. Madison*, 1 Branch 137, 177, 2 L.Ed. 60 (1803). Third, Defendants insist that the New York court could not exempt Plaintiff from sex offender registration, even if the New York court's order expressly precluded registration everywhere. But see U.S. Const. Act. IV, Sec. 1. All of these assertions are wrong, but for different reasons.

A.

As to the first mistaken assertion, Defendants' premise is that every final order in every state court proceeding must include language stating that the judgment is final and conclusive in the rendering state and in every other state. State courts rarely, if ever, enter final orders with that additional, and wholly unnecessary, directive in it. The point of the Full Faith and Credit Clause is that final judgments in one state are binding everywhere else, (*Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-50, 42 L.Ed.2d 355 (1897))

and there is no need to require every state court final judgment to add the superfluous language that Defendants insist is necessary.

Defendants also apparently maintain that the New York court did not intend to bind other states, even if the Full Faith and Credit Clause does not require nationwide preclusion language in the order itself. Although it is not entirely clear, Defendants seem to suggest that the New York did not intend to bind other states to its plea agreement. But what was " intended" is a question of fact. Neither the District Court nor Defendants were present during the plea negotiations; Plaintiff was present. And Plaintiff alleged that the intent was to ban sex offender registration everywhere. (App. 12-14) Plaintiff specifically alleged that he would not have entered the plea, except for the prosecutor's promise, and the New York court's agreement, that sex offender registration would not be required. (Id.). Those allegations must be taken as true. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 50 (1957).

Furthermore, it makes more sense to conclude that Plaintiff would find it just as onerous to register in Illinois, where he was already residing, as it would be for him to register in New York. From his perspective, Plaintiff agreed to plead to avoid registering anywhere. Nothing in the record disproves that common sense conclusion, and Plaintiff believes the state prosecutor, Plaintiff's counsel in the New York proceedings, and the New York judge will corroborate that understanding of the plea agreement. Whether he can prove his case, however, is not the issue. For now, all that is at issue is whether he has

alleged a claim. At this stage the Court must assume Plaintiff can prove every necessary allegation.

Thus, to the extent the District Court was putting a different gloss on the plea agreement, the District Court was overstepping the limits placed on it by motions to dismiss. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 167 L.Ed.2d 929 (2007). The District Court was not free to hypothesize scenarios that might undercut Plaintiff's theory of the case. The allegations in the Amended Complaint must be taken as true and, taken as true, the plea was entered in exchange for a guarantee that Plaintiff would not be subject to sex offender registration anywhere.

B.

Defendants' second premise is mistaken for a different reason. According to Defendants', federal courts must defer to every state court's interpretation of a federal constitutional issue. (Def. Brf., at 10-12) As Defendants see it, the issue is how does New York handle Full Faith and Credit issues. (Id.). If that were true, the Full Faith and Credit Clause could have 50 different interpretations. But see, *Cooper v. Aaron*, 358 U.S. 1, 17, 18, 3 L.Ed.2d 5 (1958). The issue, however, is not how New York handles Full Faith and Credit cases in general, but rather what effect Defendant's plea agreement has on other New York courts. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 337-39, 162 L.Ed.2d 315 (2005). The scope and meaning of the Full Faith and Credit Clause is a quintessentially federal question that must be resolved using federal case law.

Id. Ever since *Marbury*, there has been no doubt that the federal judiciary "is supreme in the exposition of the law of the constitution..." *Cooper*, 353 U.S. at 18.

The federal constitution is not subject to the idiosyncracies of fifty different states. So, the question is not how a New York state court might handle this issue; the question instead is how the Supreme Court applies the Full Faith and Credit Clause. *Adelman v. Booth*, 21 How. 506, 524, 16 L. Ed 169 (1858). And the answer to that question is that the Full Faith and Credit Clause requires all states to apply the New York plea agreement just as the New York courts must apply that plea agreement. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 494-96, 155 L.Ed.2d 702 (2003). Since Defendants quite properly concede that Plaintiff cannot be required to register in New York, the same applies to all other jurisdictions.

Furthermore, the cases cited by Defendants do not support their radically inapposite approach to Full Faith and Credit issues in general. (Def. Br. 8-12). Nor do those cases support Defendants' analysis of the facts or relevant legal principles as applied to Plaintiff's case.

In *People v. Arotin*, 796 N.Y.S. 2d 743 (App. Div. 2005), the defendant pled guilty in Ohio to a sex offense. He later asked to serve the balance of his parole term in New York, and his request was granted. *Id.*, at 744, 745. Consistent with New York law, he was evaluated for a "risk level," and he received a higher rating than he had received in Ohio. The higher classification caused him to challenge the New York classification on

full faith and credit grounds. His challenge was denied by the New York courts.

From that ruling, Defendants mistakenly conclude that Plaintiff's full faith and credit issue also must be denied. However, Defendants' conclusion overlooks critical factual distinctions, which demand a different result. For one, the defendant in *Arotin* did not allege that he pled guilty based on a promise that he would receive a Level I classification. In fact, a Level I classification attached "by operation of law..." in Ohio. *Id.*, at 744. Plaintiff, on the other hand, specifically alleged, and will ultimately prove, that he never would have entered the plea in New York, but for the specific promise that he would not have to register as a sex offender. Plaintiff was excused by the New York court from registration, even though the offense to which he pled normally included sex registration. The exclusion of sex offender registration in the written plea agreement supports Plaintiff's assertion that there would not be a plea, but for the promise to exempt him from registration.

Finally, because sex offender registration in Ohio was mandatory based on the defendant's guilty plea in *Arotin*, the issue in *Arotin* was not whether the plea itself could be used to require sex offender registration. Registration was mandatory once the plea was entered. Rather, the disagreement was over a risk calculator that played no role in inducing the plea by the accused in *Arotin*. By contrast, there would be no sex offense to register in Illinois, if the New York court had not promised to exclude sex offender registration.

Defendants want it both ways. They want to use Plaintiff's plea to establish a registerable offense, but they also want to ignore the plea inducement and the judgment of the New York court. Plaintiff does not dispute each state's right to classify sex offenders, but the classification has to proceed from a judgment of guilty that was not induced by a prosecutional promise, and a judicial guarantee, that the plea could not be used to require sex offender registration. What makes Plaintiff's case different from *Arotin*, and all the other cases cited by Defendants on this issue, is the express judicial guarantee that Plaintiff's plea could not result in a sex offender registration.

The same holds true for *North v. Board of Examiners of Sex Offenders*, 871 N. Illinois C. E.2d 1133, 840 N.Y.S. 2d 307 (App. Div. 2007), another case cited by Defendants. In *North*, the accused pled guilty to a federal sex offense, and later that plea was used to require him to register as a sex offender in New York. As was true in *Arotin*, the accused in *North* did not claim that his federal guilty plea was induced by a promise that he would not have to register as a sex offender. Nor did the accused in *North* raise a full faith and credit argument. Again, the distinction is between a plea that is neither induced by a prosecutorial promise and a judicial guarantee – that sex registration will not be required - and a plea that was not induced by a judicial promise.

New York has the right to preserve the integrity of a its judgments, and the Full Faith and Credit Clause affords New York the constitutional leverage to ensure that judgments entered in its courts will not be misused in other states. *Baker v. General*

Motors Corp., 522 U.S. 222, 232, 139 L.Ed.2d 580 (1991). Furthermore, the New York court's decision to take Plaintiff's plea in exchange for a judicial guarantee– that Plaintiff was exempt from registration– does not upend Illinois registration laws.

When one state court enters an order that does not specifically address sex offender registration, other states are free to impose a registration requirement because the imposition of that requirement is not inconsistent with the first state's judicial order. But when one state specifically exempts sex registration as an essential element of the plea, other states cannot use the guilty plea but ignore the consequent material element which exempted sex offender registration.

The Full Faith and Credit Clause "is exacting" and demands absolute fealty when a judicial order is under consideration. *Baker*, 522 U.S. at 233. Plaintiff was not negotiating for a reprieve in one state, only to be saddled with the same stigma and reporting restrictions in another state. He has alleged, and he can prove, that he bargained for an exemption from registration everywhere.

C.

Third, Defendants and the District Court misconstrue, and then overstate, the consequences of Plaintiff's Full Faith and Credit argument. Every state is free to establish its own rules governing sex offender registration, and no state may veto the legislative pronouncements of another state. *Nevada v. Hall*, 440 U.S. 410, 59 L.Ed.2d 416 (1976). By the same token, no state my act in derogation of a final judgment entered in another

state. Full faith and credit must be given to the New York court's final judgment. As applied here, that means the New York court's order cannot be used to establish grounds for sex offender registration in Illinois. New York has the right to preserve and protect the integrity of its criminal justice system, which, as is in most jurisdictions, relies extensively on plea agreements. New York honored its plea agreement with Plaintiff because failure to do so would lead to distrust among charged offenders and would result in fewer pleas. New York also honored its plea agreement because it was constitutionally obligated to honor it. And that agreement must be honored by every other state.

Illinois is free to define sex offender registration as broadly, less broadly or more broadly than New York, and Plaintiff has not questioned Illinois' sex offender registration categories. That statute is not put in doubt by Plaintiff's claim. The issue is not who is required to register in Illinois, but rather how Illinois can establish the predicate sex offense. Plaintiff cannot be forced to register unless he committed a registerable sex offense, and Defendants cannot establish a registerable offense without using the New York plea. But New York must be allowed to determine how its judgments are used, and New York told Illinois, and every other state, you cannot use our plea agreement with Plaintiff to establish a registerable sex offense in your state. That understanding of the effect of the New York preserves the integrity of the New York court's final judgment without crippling the Illinois sex offender registration program. New York is not controlling who must register in Illinois; New York merely is limiting the use of its plea

agreement, thereby ensuring that the plea agreement is honored everywhere.

Nonetheless, Defendants maintain that cases like *Burgess v. Ryan*, 996 F.2d 180 (7th Cir. 1993) prove that a criminal conviction in one state "does not necessarily have the same collateral effect in another state." (Def. Brf., at 12) True enough in general, but not when the conviction was purchased with a judicial promise that it would not be used as a predicate offense by other states. *Burgess*, in fact, is entirely compatible with Plaintiff's right to claim. The accused in *Burgess* pled guilty to a DUI-like offense in Colorado. Under Colorado law that offense would not have resulted in a suspended license. However, an interstate compact required Colorado to report the conviction to Illinois, which had issued the license to the accused in *Burgess*, 996 F.2d at 181, 182. Under Illinois law the Colorado offense required suspension. *Id.*

Thus, the accused in *Burgess* was on notice before he pled in Colorado that his plea would result in suspension of his Illinois license, yet he did not secure a judicial order permitting the use of his guilty plea. Here, the opposite is true– Plaintiff had every right to believe that his New York plea could not be used as a predicate offense for sex offender registration anywhere, because the New York court agreed to those terms. In any event, *Burgess*, was not decided on Full Faith and Credit grounds. The holding in *Burgess* was that the Due Process Clause did not require notice and a hearing before Illinois suspended the accused's license, as long as there was a prompt, post-deprivation hearing. In that respect, *Burgess* does not even address the question presented here.

Defendants' reliance on *Lowery v. McCaughtry*, 954 F2d 422 (7th Cir. 1992) suffers the same fate, and for similar reasons. *Lowery* was a habeas case decided on grounds unrelated to the Full Faith and Credit Clause. In a judicial aside, the *Lowery* court noted that "if the rendering state sets aside to conviction, other states may not use that judgment to enhance their own sentences." *Lowery*, 954 F.2d at 424. By the same force of reason, if the rendering state holds that its judgment may not be used as a predicate offense for sex offender registration, no other state may use that judgment to compromise the intended result, as established by the rendering state.

Plaintiff's case is unique and not likely to recur. Most states have mandatory sex offender registration, so the rendering state does not have discretion to exempt the offender in that state, or any other state. As to states that allow judicial discretion for minor offenses, only those judgments that are based on plea agreements that exempt registration would be covered by the very limited application of the Full Faith and Credit Clause that is at issue here. So far as Plaintiff can tell, there is no reported case with facts like those presented here. His case is unique because a) sex offender registration was left within the discretion of the sentencing judge; b) the rendering state's judgment was based on a plea agreement; and c) the plea agreement exempted Plaintiff from registration– a rare judicial act in times when judges are loudly criticized for any leniency in sex cases. Based on the unique facts of this case and the need to give more than lip service to the Full Faith and Credit Clause, the District Court's order must be reversed.

CONCLUSION

For all of these reasons as well as those set forth in Plaintiff's opening brief, the Court should reverse and remand the case.

Respectfully Submitted,

Thomas Peters
407 S. Dearborn, Suite 1675
Chicago, IL 60605
(312) 697-0022

CERTIFICATE OF COMPLIANCE WITH RULE 32

In accordance with F.R. App. P. 32(a)(7), I hereby certify that the foregoing Reply Brief complies with the type and volume limitations set forth in F.R. App. P. 32(a)(7)(b). The Reply Brief contains 3061 words, beginning with the word "Argument" and ending with the words "Respectfully Submitted," as recorded by the word count function of Word Perfect 8 system that was used to prepare this Reply Brief.

_____
Thomas Peters

CERTIFICATE OF COMPLIANCE WITH RULE 31

The undersigned hereby certifies that he has filed electronically this Reply Brief in non-scanned PDF Adobe format along with a Separate Appendix, pursuant to Rule 31(e).

_____
Thomas Peters

CERTIFICATE OF SERVICE

I certify that I served the Reply Brief of the Plaintiff-Appellant by placing three copies of the brief and a computer disk containing its text in an envelope with sufficient postage affixed and addressed to the persons named below at the address indicated for them, and I deposited that envelope in the United States mail at 407 S. Dearborn, Chicago, Illinois 60605 before 5:00 p.m. on October 6, 2009.

_____
Thomas Peters

SERVICE LIST

Mary E. Welsh
Assistant Attorney General
100 W. Randolph Street
12th Floor
Chicago, IL 60601